

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MBL/TONI&GUY PRODUCTS, L.P.
and TONI&GUY HAIRDRESSING
ACADEMY FRANCHISE, LP,

Plaintiffs,

v.

MICHAEL KENNARD, BETTY
STOCK KENNARD; and TONI &
GUY HAIRDRESSING ACADEMY,
INC.,

Defendants.

Case No. C09-501MJP

ORDER ON PLAINTIFFS' MOTIONS
FOR DEFAULT AND PRELIMINARY
INJUNCTION

The above-entitled Court, having received and reviewed:

1. Plaintiffs' Motion For Entry of Default Against Defendants Betty Stock Kennard and Toni and Guy Hairdressing Academy, Inc (Dkt. No. 16)
2. Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 10)
3. Sworn Affidavit of Defendant, Michael Kennard (Dkt. No. 18)
4. Plaintiffs' Reply to Sworn Affidavit of Defendant, Michael Kennard (Dkt. No. 20)
5. Sworn Affidavit of Betty Stock Kennard (Dkt. No. 21)

all exhibits and declarations attached thereto, makes the following rulings:

IT IS ORDERED that Plaintiffs' motion to enter default against Defendant Toni & Guy Hairdressing Academy, Inc. is GRANTED.

1 IT IS ORDERED that Plaintiffs' motion to enter default against Defendant Betty Stock
2 Kennard is DENIED.

3 IT IS ORDERED that Defendants are ENJOINED from using the Toni & Guy mark
4 pending resolution of this lawsuit and that Defendants remove from public view all local
5 signage that bears this mark and transfer to Plaintiffs the telephone number under the Toni &
6 Guy Yellow Pages listing; this must be accomplished within three days of receipt of this
7 order.

8 IT IS FURTHER ORDERED that Plaintiffs' motion to require Defendants to deliver all
9 materials bearing the Toni & Guy mark to Plaintiffs for destruction, cancel Defendants' state
10 and city licenses, and deliver a written report within five days detailing Defendants'
11 compliance is DENIED.

12 The reasons for the Court's decisions are discussed below.

13 **Background**

14 The following facts are uncontroverted and drawn from Plaintiffs' Motion for
15 Preliminary Injunction. Dkt. No. 10. Plaintiffs are international companies which operate
16 over 200 hairdressing salons and academies under their "Toni&Guy" brand including an
17 academy in Bellingham, Washington. Defendants own and operate Bellingham Beauty
18 School in Bellingham, Washington. Upon learning of the possibility of the opening of an
19 authorized Toni&Guy franchise in Bellingham, Defendants registered "Toni & Guy
20 Hairdressing Academy, Inc." as a for-profit corporation with the State of Washington in
21 November, 2007. Defendants' Toni & Guy Hairdressing Academy, Inc. then obtained a
22 business license with the City of Bellingham and State of Washington and a listing in the
23 Yellow Pages for a telephone number which is never answered. These advertisements and
24 business registrations list 203 W. Holly Street, Suite 206, Bellingham Washington as the
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1 location of the academy. This location is an office suite which bears “Toni & Guy
2 Hairdressing Academy” signs but remains empty with locked doors.

3 An authorized Toni&Guy Hairdressing Academy opened in Bellingham in November
4 2008. Sometime before March 2009, Plaintiffs learned of Defendants’ use of the “Toni &
5 Guy” name. On April 14, 2009, Plaintiffs filed a complaint alleging violations of sections 32
6 of the Lanham Act (15 U.S.C. § 1114), 43(a) of the Lanham Act (15 U.S.C. § 1125(a)), and
7 Washington’s Consumer Protection Act. Dkt. No. 1.

8 Following the filing of the complaint in this matter, the only timely answer was
9 submitted by Defendant Michael Kennard. Dkt. No. 15. Plaintiffs thereafter moved for an
10 order of default against Defendants Betty Stock Kennard and Toni & Guy Hairdressing
11 Academy, Inc. (Dkt. No. 16), and the Court issued an order to show cause to the remaining
12 Defendants as to why default should not issue against them. Betty Stock Kennard filed an
13 “Answer and Sworn Affidavit” (Dkt. No. 21) on May 18, 2009; no response was ever
14 received from the corporate defendant.

15 On April 16, 2009, Plaintiffs moved for a preliminary injunction, requesting that
16 Defendants be enjoined from using the Toni & Guy mark and that Defendants remove from
17 public view all local signage that bears this mark, transfer to Plaintiffs the telephone number
18 listed for “Toni & Guy” in the Yellow Pages, deliver all materials bearing the Toni & Guy
19 mark to Plaintiffs for destruction, cancel Defendants’ state and city licenses, and deliver a
20 written report within five days detailing Defendants’ compliance. Dkt. No. 10. In response to
21 Plaintiffs’ motion, Defendant Michael Kennard filed an affidavit in which he alleged a
22 number of facts but provided no substantive response to the motion for preliminary
23 injunction. Dkt. No. 18.

1 **Motion for default**

2 Plaintiffs have provided proof that corporate Defendant Toni & Guy Hairdressing
3 Academy, Inc. has been properly served in this lawsuit. Dkt. No. 13. The record reflects that
4 no appearance has been made on behalf of the corporate defendant, no answer to the
5 complaint has been filed on its behalf, and no response to the Court's Order to Show Cause
6 has been submitted. The Court will enter an order of default against Defendant Toni & Guy
7 Hairdressing Academy, Inc.

8 The Court finds that Defendant Betty Stock Kennard's "Answer & Sworn Affidavit"
9 is sufficient to establish that she has appeared and answered in this matter. Plaintiffs'
10 objections to the pleading treat the document as a response to their motion for preliminary
11 injunction; the Court does not view it as responsive to the preliminary injunction request and
12 did not consider it in the context of that motion. Plaintiffs' further objection (that the
13 affidavit should be stricken because it is unsigned) is not well-taken – the document's use of
14 "/s" on the signature line is sufficient for purposes of an electronically-filed document.

15 Based on Defendant Betty Stock Kennard's appearance and answer, the Court denies
16 Plaintiffs' request for an order of default against her.

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18 **Standard of proof for injunctive relief**

19 Federal district courts are authorized to issue preliminary injunctions pursuant to
20 FRCP 65(a). A grant of preliminary injunctive relief should issue when the moving party has
21 demonstrated either a likelihood of "probable success on the merits and irreparable injury," or
22 else has raised "serious questions" regarding the merits of the case and shown that the
23 "balance of hardships tips sharply in his favor." Sardi's Rest. Corp. v. Sardie, 755 F.2d 719,
24 723 (9th Cir. 1985). Plaintiffs must meet one of these two standards to obtain injunctive
25 relief. Id.

1 **Discussion**

2 I. Likelihood of success on the merits/irreparable injury

3 A. A violation of Section 32 of the Lanham Act (15 U.S.C. § 1114) requires a
4 showing that:

- 5 1. The marks are valid and legally protectable; and
- 6 2. Defendants' use of the marks to identify goods and services is likely to create
7 confusion concerning the origin of the goods or services.

7 Cairns v. Franklin Mint Co., 292 F.3d 1139, 1149.

8 Plaintiffs registered each of the marks at issue with the Principal Register of the US
9 Patent and Trademark Office. These registrations are prima facie evidence that Plaintiffs
10 have an exclusive right to use the marks (15 U.S.C. § 1114), and Defendants do not challenge
11 them.

12 To assess the likelihood of confusion, Ninth Circuit courts consider a set of factors
13 which include: (1) the strength of the senior mark; (2) proximity of the services provided by
14 the parties under their respective marks; (3) similarity of the marks; (4) evidence of actual
15 confusion; (5) marketing channels used; (6) the type of services and the degree of care likely
16 to be exercised by purchasers; (7) Defendant's intent in selecting the mark; and (8) the
17 likelihood of expansion of the services. AMF Inc. v. Sleekcraft Boats, 559 F.2d 341, 348-49
18 (9th Cir. 1979). The Court considers that the services provided by the authorized franchise
19 and by Defendants are identical, Plaintiffs' marks and the marks Defendants use are identical,
20 and Defendants employ the same marketing channels in the same city as Plaintiffs (the
21 Yellow Pages and location signage). As noted supra, Defendants do not respond to this
22 argument. The Court finds that Plaintiffs have established a high likelihood of confusion and
23 will likely prevail on the merits of the Section 32 of the Lanham Act claim.

1 B. A claimed violation of section 43(a) of the Lanham Act (15 U.S.C. § 1125(a))
2 requires a showing that:

- 3 1. Defendant has made false or misleading statements as to their own product or
4 the product of another;
- 5 2. There is actual deception or at least a tendency to deceive a substantial portion
6 of the intended audience;
- 7 3. The deception is material in that it is likely to influence purchasing decisions;
- 8 4. The trademark infringement has a substantial economic effect upon interstate
9 use by a mark's owner; and
- 10 5. There is likelihood of injury, including declining sales and a loss of goodwill.

Cook Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 244 (9th Cir. 1990).

11 Despite Defendants' advertisements in the Yellow Pages, signs at the location, and
12 business licenses using the Toni & Guy mark, Defendants are not operating an academy from
13 the location nor answering the listed telephone number. Plaintiffs' allegations establish a
14 likelihood of confusion on the part of potential customers, and the marks at issue will
15 influence purchasing decisions resulting in a decline of sales and goodwill. However,
16 Plaintiffs have not alleged that Defendants have made false or misleading statements
17 regarding Plaintiffs' products or their own. On that basis, the Court finds that Plaintiffs are
18 unlikely to prevail on the merits of this claim.

19 C. To prevail on an unfair competition claim under Washington's Consumer
20 Protection Act requires a showing that:

- 21 1. Defendant's engaged in an unfair or deceptive act or practice;
- 22 2. In trade or commerce;
- 23 3. Which affects the public interest;
- 24 4. Injury to the Plaintiff's business or property; and
- 25 5. A causal link between the unfair practice and the injury.

1 Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85
2 (1986).

3 As the Washington Supreme Court has stated, trademark infringement is a form of
4 unfair competition because the likelihood of confusion among consumers is sufficient to
5 satisfy the public interest test. Nordstrom v. Tampourlos, 107 Wn.2d 735, 742-43 (1987).
6 Plaintiffs persuasively claim injury to goodwill and reputation of their brand as well as lost
7 customers based on consumers mistakenly believing that “Toni & Guy Hairdressing
8 Academy, Inc.” is an official enterprise of Plaintiffs. Plaintiffs further claim this harm is
9 exacerbated by Defendants’ competing beauty school. As noted supra, Defendants do not
10 respond to this argument. The Court finds that Plaintiffs will likely succeed on the merits of
11 this claim.

12 D. The Court finds that Plaintiffs have also established a likelihood that they can
13 demonstrate damages amounting to irreparable injury. Although the harm that Defendants
14 have caused to Plaintiffs is indeterminable, Ninth Circuit Courts recognize trademark
15 infringement as an irreparable harm to the trademark owner’s goodwill and business
16 reputation because of the public’s association of its mark with non-identical goods and
17 services. El Pollo Loco, Inc. V. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003). In addition, in
18 the Ninth Circuit, a threat of consumer confusion as to the source or origin based on
19 trademark infringement creates a presumption of irreparable harm. Vision Sports, Inc. v.
20 Mellville Corp., 888 F.2d 609, 612 (9th cir. 1989). Plaintiffs have demonstrated they have
21 developed their marks through the expenditure of considerable time, skill, labor, and expense
22 over several decades and that the harm is particularly severe in light of Plaintiffs’ franchise
23 system. The Court finds that these harms are not likely to be reducible to a dollar amount.
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1 II. Serious question/balance of hardships

2 In the realm of trademark infringement, courts have found an overarching issue of
3 public policy. “Since Congress has elected to grant certain exclusive rights to the owner of a
4 copyright in a protected work, it is virtually axiomatic that the public interest can only be
5 served by upholding copyright protections and preventing the misappropriation of the skills,
6 creative energies, and resources which are invested in the protected work.” Apple Computer,
7 Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d. Cir. 1998). The Court finds that
8 Plaintiffs have succeeded in satisfying the “serious question” inquiry.

9 The Court next turns to whether the balance of hardships tips in favor of one side or
10 another and finds that the “balance of hardship” test tips sharply in Plaintiffs’ favor. Plaintiffs
11 have produced evidence that Defendants’ activities are having an ongoing detrimental effect
12 in the areas of consumer goodwill, reputation, and profit for its brand and local franchise. In
13 contrast, there is no harm to Defendants if the Court preliminarily enjoins Defendants’
14 continued infringement of the marks, since it does not appear that Defendants are actually
15 operating a business under the challenged name. Dkt. No. 18, p. 19.

16 **Conclusion**

17 The Court finds that corporate defendant Toni & Guy Hairdressing Academy has not
18 appeared or answered in this matter. The Court grants Plaintiffs’ request for an order of
19 default against Defendant Toni & Guy Hairdressing Academy, Inc. The Court also finds that
20 Defendant Betty Stock Kennard’s “Answer & Sworn Affidavit” is sufficient to establish that
21 she has appeared and answered in this matter. The Court denies Plaintiffs’ request for an
22 order of default against Defendant Betty Stock Kennard.

23 The court finds that Plaintiffs have demonstrated a likelihood of success on the merits
24 of some of its claims and that Plaintiffs stand to be irreparably injured if Defendants are not
25 enjoined from using the Toni & Guy mark. The Court also finds that Plaintiffs have raised a

1 serious question concerning public policy and that the balance of hardships scale tips in
2 Plaintiffs' favor. Plaintiffs' prayer for relief includes enjoining Defendants from using the
3 marks, removing local signage, and transferring the telephone number listed in the Yellow
4 Pages to Plaintiffs. These actions would reasonably prevent further harm by removing the
5 infringing marks from the public sphere. These actions should be accomplished within three
6 days of the receipt of this order. However, Plaintiffs' requests that Defendants deliver all
7 materials bearing the mark to Plaintiffs for destruction, cancel Defendants' state and city
8 licenses, and deliver a written report within five days detailing Defendants' compliance are
9 denied pending the final resolution of Plaintiffs' litigation.

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12 The Clerk is directed to send a copy of this order to Defendants and to all counsel of
13 record.

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15 DATED this 29th day of June, 2009.

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18 Marsha J. Pechman
19 United States District Judge
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